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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G040273
v.	(Super. Ct. No. 07HF1976)
LINDA LEE HALL	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

We appointed counsel to represent defendant on appeal. Counsel filed a brief which set forth the facts of the case. Counsel did not argue against the client, but advised the court no issues were found to argue on defendant's behalf, and requests this court independently review the entire record. (*People v. Wende* (1979) 25 Cal.3d 436.) Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel discussed possible claims appearing in the record.

Defendant was given 30 days to file written argument in defendant's own behalf. That period has passed, and we have received no communication from defendant. We affirm.

I

FACTS AND DISCUSSION

Defendant Linda Lee Hall was convicted of possession and transportation of heroin and methamphetamine and possession of controlled substance paraphernalia as charged in counts one through five of the complaint. The court sentenced her to five years in state prison.

Ineffective assistance of counsel

In her brief, defendant notes the evidence against her was found when her person, her car and her hotel room were searched without a warrant. She says: "Was trial counsel constitutionally ineffective for failing to make a motion to suppress under Penal code section 1538.5?" and "Could such an issue be raised on appeal, or must it be raised in a petition for habeas corpus?"

At first, defendant declined consent for the police to search. At that point, her probation officer was contacted to find out her probationary terms. One of the officers testified when the searches proceeded: "Once we officially established that she was on search and seizure, and also after she gave consent to have her purse searched by the sergeant . . . ."

"'To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's findings. . . . "[W]here the record shows that counsel's omissions resulted from an informed tactical choice within the range of reasonable competence, the conviction must be affirmed.'" (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 28.)

"'As the United States Supreme Court noted in *Strickland v. Washington*: "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."' [Citations.]" (*People v. Dimitrov, supra,* 33 Cal.App.4th at pp. 28-29.)

"A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: [¶] (A) The search or seizure without a warrant was unreasonable. [¶] (B) The search or seizure with a warrant was unreasonable because any

of the following apply: [¶] . . . [¶] (iv) There was any other violation of federal or state constitutional standards. [¶] . . . [¶] (c)(1) Whenever a search or seizure motion is made in the superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion." (Pen. Code, § 1538.5, subdivisions (a)(1), (A), (B), (iv) and (c)(1).)

"In California, a person may validly consent in advance to warrantless searches and seizures in exchange for the opportunity to avoid serving a state prison term. [Citations.] Warrantless searches are justified in the probation context because they aid in deterring further offenses by the probationer . . . . By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers. [Citation.]" (*People v. Robles* (2000) 23 Cal.4th 789, 795.)

In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. (*People v. Ayala* (2000) 24 Cal.4th 243, 279.) Here, we find no indication defendant's trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates. Nor do we find it is reasonably probable that a more favorable determination would have resulted had counsel moved to exclude the evidence seized after warrantless searches because defendant had agreed to warrantless searches as a condition to receiving probation.

Motion to relieve counsel and motion for continuance to hire retained counsel

Defendant's brief states: "On the morning of trial, before the start of voir dire, Ms. Hall requested a continuance so that she could be represented by private counsel at trial. The court denied her request. Soon thereafter, Ms. Hall renewed her request. 'In deciding whether the denial of a continuance was so arbitrary as to violate due process, the reviewing court looks to the circumstances of each case, particularly in the reasons

presented to the trial judge at the time the request was denied.' (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850.)"

The record reflects defendant, herself, tried to speak with the court and was admonished to permit her attorney to speak for her. There was a discussion off the court reporter's record, and when the record resumed, the judge stated: "Miss Hall, Mr. Valle said you wanted to talk to me about waiving time and getting more time to hire an attorney; is that right?" Defendant said it was, and the judge stated: "Well, let me tell you where I'm coming from. I mean the case is on day seven of ten, and you were arraigned a long time ago. And a person does have the right to hire an attorney, but you haven't been able to do that till now. Why should I delay it? The prosecutor is ready, witnesses are subpoenaed, we're all here ready to go." Defendant responded: "In November, your Honor, I requested a couple tests run and witnesses, and Fernando suggested that we waive time till after the holidays, which I don't want to forfeit the holidays with my family, but it would have to go to January if we ran these tests. I said okay, I'll do that. But as of last week he still hadn't run the tests. Also on Monday of last week when you asked him he said no, they didn't do that. I said Fernando, I want to relieve your services today because — "

The court interrupted and said: "That's a little bit separate than asking for more time. That's if you're going to talk about relieving your attorney we'll have to ask the prosecutor to step outside and close the court. Because that's a private matter. But, the first request was it to just get more time to hire an attorney? That's what I understood from your — " It was defendant who then interrupted the judge and said: "Yes, because on Monday of last week, you know, when I found out what he had gotten done so far, I told him my kids wanted to hire an attorney. We're confident — " At that point, the court conducted a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). After a *Marsden* hearing was held, the court denied both the *Marsden* motion and the request for continuance.

"Generally the trial court has discretion whether to grant a continuance to permit a defendant to be represented by retained counsel. [Citation.] 'The right of a defendant to appear and defend with counsel of his own choice is not absolute.' [Citations.] 'A continuance may be denied if the accused is "unjustifiably dilatory" in obtaining counsel, or "if he arbitrarily chooses to substitute counsel at the time of trial." [Citation.] In deciding whether the trial court's denying a continuance was so arbitrary as to deny due process, this court 'looks to the circumstances of each case, "'particularly in the reasons presented to the trial judge at the time the request [was] denied.'" [Citations.]' [Citation.]" (*People v. Jeffers, supra,* 188 Cal.App.3d at p. 850.)

"We start with the proposition in *Gideon v. Wainwright* (1963) 372 U.S. 335 that criminal defendants are entitled under the Constitution to the assistance of court-appointed counsel if they are unable to employ private counsel. However, the decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the discretion of the trial court, and a defendant has no absolute right to more than one appointed attorney." (*Marsden, supra,* 2 Cal.3d at p. 123.)

The Supreme Court discussed the necessity and purpose of a hearing for the trial court to conduct to determine whether or not appointed counsel should be replaced: "A trial judge is unable to intelligently deal with a defendant's request for substitution of attorneys unless he is cognizant of the grounds which prompted the request. The defendant may have knowledge of conduct and events relevant to the diligence and competence of his attorney which are not apparent to the trial judge from observations within the four corners of the courtroom. Indeed, '[w]hen inadequate representation is alleged, the critical factual inquiry ordinarily relates to matters outside the trial record: whether the defendant had a defense which was not presented; whether trial counsel consulted sufficiently with the accused, and adequately investigated the facts and the law; whether the omissions charged to trial counsel resulted from inadequate preparation

rather than from unwise choice of trial tactics and strategy.' [Citation.]" (*Marsden, supra,* 2 Cal.3d at pp. 123-124.)

Unlike the situation in *Marsden,* defendant did not seek to substitute one appointed counsel for another, but sought to substitute appointed counsel with retained counsel. "The decision whether to grant a requested substitution is within the discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would 'substantially impair' the defendant's right to effective assistance of counsel. [Citation.]" (*People v. Roldan* (2005) 35 Cal.4th 646, 681.)

The trial court gave defendant ample opportunity to explain her unhappiness about both her counsel and her request for a continuance, and found no basis for relieving retained counsel and that defendant had been dilatory in moving for a continuance. We find no abuse of discretion.

Prior conviction

The People filed a brief requesting admission of a prior crime pursuant to Evidence Code section 1101, subdivision (b). During argument on the matter, the court remarked: "Well, first of all, in respect for lack of similarity, the *Ewoldt* case . . . indicates that for other acts to be admissible for intent, the least degree of similarity is necessary. Here we have a case 11 months earlier, where there's a scale. There is methamphetamine. There are pipes. And there's a judicial admission . . . quite close to the date in question. Plea of guilty August 1st, admitting the charges. And the date of this offense is September 26th." In making its ruling, the court stated: "Well, the court has already determined relevance. The issue is 352. I think that the People's summary of the law on 352 at the top of page 5 is correct. The prejudice referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against

the defendant as an individual. And which has very little effect on the issues. Prejudicial is not synonymous with damaging. [¶] . . . [¶] The court is going to allow the prior situation on October 12th, '06. But in view of the three witnesses the consumption of time the court is going to request that the People use certified copies of the conviction."

A minute order states: "Parties discuss a possibility of a stipulation to the prior 11378 HS conviction as opposed to redacting the factual basis on the Tahl form." A stipulation was read to the jury: "The People and defendant Linda Lee Hall, along with her Attorney Fernando Valle, all agree and stipulate to the following: In Orange County, California, on October 12th, 2006, defendant Linda Lee Hall, willfully and unlawfully possessed a usable quantity of methamphetamine for the purpose of sales."

Evidence Code section 1101 precludes the admission of evidence of uncharged crimes when offered to show nothing more than bad character or a propensity for criminality. But that section further provides, "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Intent requires the least degree of similarity between the charged crime and uncharged incident. (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 402-403.) "Admission of Evidence Code section 1101, subdivision (b) evidence is addressed to the sound discretion of the trial court. The trial court may exclude or admit this type of evidence pursuant to Evidence Code section 352 which provides: 'The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' The trial court's determination will not be disturbed on appeal absent a clear showing of

an abuse of discretion. [Citations.]" (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1609-1610.)

"On appeal, a trial court's ruling under Evidence Code sections 1101 and 352 is reviewed for abuse of discretion. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 637.) "A court abuses its discretion when its ruling 'falls outside the bounds of reason.' [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

The court weighed the probative value of the evidence against its prejudicial effect and determined the evidence was admissible. The prior crime, which defendant admitted just a little over a month before she was arrested for the current crime, was substantially similar to the current crime. Under the circumstances in this record, we cannot conclude the trial court abused its discretion.

Unanimity instruction

Defendant's brief says: "Ms. Hall was charged with a single count of possessing heroin for sale. The evidence at trial showed that heroin was found in two locations: three small bindles were found in the hotel room where Ms. Hall was staying, and one small bindle was found at the jail during a booking search of Ms Hall. When jurors can reasonably rely upon drugs found in different locations to support a single charge of possession, a unanimity instruction is required."

Christopher Bates, a police officer with the City of Costa Mesa testified he conducted a lawful search of a motel room registered to defendant at the Tern Inn in Costa Mesa. Bates said he found a blue nylon pouch. He said he did not make a thorough examination of the pouch because his "instructions were by the sergeant to search the room, and if I located any narcotics of any type to contact him. I obviously to me I had located narcotics. So after finding them I closed the bag back up, contacted the sergeant, and told him what I had found." Bates was told to relinquish the bag to Officer Doezie at the jail, which he did do.

Jon Doezie, also a police officer with the Costa Mesa Police Department, said as part of the investigation he conducted a lawful search of defendant's purse. In the purse he found $852, all neatly arranged. Inside defendant's car, he found a second purse which contained a three by four-inch spiral notebook which appeared to him to be a pay or owe list, a record or log typically kept by people who engage in the sale of drugs.

Doezie testified Bates gave him a blue nylon pouch. Inside the pouch, he found a blue digital scale that "had a white crystal-like substance residue over it, or on it." Also in the bag were three bindles of heroin. He described how he found the heroin: "The three bindles were torn pieces of white plastic, similar to a grocery bag that — the same plastic material. They were torn into segments. Inside the segments was a black tar like substance, which I recognized as heroin. Then they were twisted to seal the substance inside." The three bindles weighed .97, .99 and 3.46 grams.

Guadalupe Lopez, another Costa Mesa police officer, searched defendant during booking. She found two bumps inside defendant's bra area, and when she pulled the bra forward, one bindle fell out and Lopez removed the other. Doezie picked up the bindle from the floor. He recognized both bindles as methamphetamine.

Lopez continued with a strip search. A white bindle with a black tarry substance was found. Doezie recognized that bindle to be heroin.

"'In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]' [Citation.]" (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 183-184.)

If jurors could have reasonably relied upon different units of [illegal narcotics] to convict appellant then a unanimity instruction was required. (*People v. King* (1991) 231 Cal.App.3d 493, 501-502.) In convicting defendant of possession for sale and

transportation of heroin, the jury could have relied on the heroin found in the pouch confiscated by Bates or in the heroin found on defendant by Lopez when she conducted a strip search of defendant. Under these circumstances, there is a factual uncertainty in the verdicts and a unanimity instruction was required.

"On the applicable standard of harmless error, there is a split of opinion. In *People v. Vargas* (2001) 91 Cal.App.4th 506, the court held that the state law standard of *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*) applied. It reasoned that there is no federal constitutional right to a unanimous jury verdict; the right to a unanimous jury verdict, and hence the right to a unanimity instruction, derives from our state Constitution. (*Vargas,* at p. 562; see Cal. Const., art. I, § 16.)" (*People v. Wolfe, supra,* 114 Cal.App.4th at pp. 185-186.) [¶] "On the other hand, in *People v. Deletto* (1983) 147 Cal.App.3d 458, the court held that the federal constitutional *Chapman* [*Chapman v. California* (1967) 386 U.S. 18] standard applied. It explained that the failure to give a unanimity instruction has the effect of lowering the prosecution's burden of proof, and an instruction that lowers the prosecution's burden of proof violates due process. [Citation.]" (*People v. Wolfe, supra,* 114 Cal.App.4th at p. 186.) [¶] "We find *Deletto's* reasoning more persuasive." (*Ibid.*)

Under the circumstances in this record, in light of the overwhelming evidence against defendant with regard to all of the heroin seized, either standard of harmless error is satisfied. We find beyond a reasonable doubt the result would have been the same had the jury been given a unanimity instruction. Therefore, the court's error was harmless.

Denial of probation

In her brief, defendant argues: "At sentencing, the defense moved for a grant of probation with a sentence to a residential drug treatment program. Trial counsel stated that Ms. Hall had already been accepted into such a program. The court denied

probation. The decision whether to grant or deny probation is within the discretion of the trial court, but that discretion may not be exercised arbitrarily or capriciously."

During sentencing, the court stated: "All right. The court's tentative sentence in this matter would be midterm on count 1, which is four years, and one-third the midterm on count 3, which is one year. With a total of five years. Everything else would be suspended. And the probation violation the court would sentence her to two years concurrent."

Defense lawyer argued defendant has a drug problem and needs help. Counsel conceded defendant "has somewhat of a little criminal past, but she has never been to state prison before. She had — I know the court's read the sentencing report. She had federal probation back in '91 for possession of cocaine, which she completed her three years of probation. After that you look at in 2004, 11364 paraphernalia, she did 12 days. A trespass in 2005, she did six days. And then six days on a p.v. There were 12500 in 2006, misdemeanor. And I don't know what a 419[1] is, your Honor, but it looks like it's a misdemeanor. She did six days jail. The most recent ones are the '06 possession for sales." Counsel went on to argue defendant someone from Hope House found she was a good candidate for a residential treatment program, that defendant has an A.B.A. degree in marketing, lost her 15-year business because of drug addiction, has four children and is not a violent person.

The court then discussed a statement on page 21 of the probation report: "The defendant has been convicted of four felony counts as well as two prior felony convictions within the meaning of 11370.07 (a) and 11370.2 (c) H&S, therefore, probation is prohibited by Penal Code Section 1203.07 (a)(11) and criteria affecting the

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[1] Penal Code section 419 is entitled "Repossession of lands after removal by legal process."

decision to grant or deny probation will not be discussed."[2] Defense counsel responded by asking the court to exercise its discretion under Penal Code section 1385, which provides: "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading." The court did not exercise its discretion under Penal Code section 1385 and imposed the tentative sentence.

A reviewing court cannot disturb an exercise of discretion unless it is "arbitrary, capricious, or patently absurd." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) Under these circumstances, where defendant is statutorily ineligible for probation, we cannot find any abuse.

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[2] Penal Code section 1203.07, subdivision (a)(11) provides: "(a) Notwithstanding, Section 1203 probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any of the following persons: [¶] . . . [¶] (11) Any person convicted of violating Section 11351, 11351.5, or 11378 of the Health and Safety Code by possessing for sale cocaine base, cocaine, or methamphetamine, or convicted of violating Section 11352 or 11379 of the Health and Safety Code, by selling or offering to sell cocaine base, cocaine, or methamphetamine and who has one or more convictions for violating Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, or 11379.5 of the Health and Safety Code. For purposes of prior convictions under Sections 11352, 11379, and 11379.5 of the Health and Safety Code, this subdivision shall not apply to the transportation, offering to transport, or attempting to transport a controlled substance.

II

DISPOSITION

We have examined the record and found no other arguable issues. The judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.